STATE OF MICHIGAN

COURT OF APPEALS

SCOTT R. RAUSCH,

Plaintiff-Appellant,

v

LLOYD J. YEO, as Successor Trustee of the RONALD W. GROH LIVING TRUST, and ST. JOHN'S EVANGELICAL LUTHERAN CHURCH OF FRANKENMUTH,

Defendants-Appellees.

UNPUBLISHED
January 23, 2007

No. 269737
Saginaw Circuit Court
LC No. 05-058165-CK

Before: Murray, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Plaintiff Scott R. Rausch appeals by right from the trial court's order granting defendants' motion for summary disposition. We affirm.

Plaintiff borrowed $275,000 from Ronald Groh in April 1993. Ronald established the Ronald W. Groh Living Trust (Groh trust) in June 1995, naming himself as trustee and his brother, Marvin, as successor trustee. The terms of the trust indicated that Marvin would become trustee before Ronald's death if Ronald was found to be legally or physically incapacitated. Ronald placed many of his assets in the trust, including the promissory note covering the outstanding balance of plaintiff's loan. The Groh trust also included provisions for the distribution of certain trust assets after Ronald's death, and granted the remainder of the trust assets to St. John's Evangelical Lutheran Church of Frankenmuth (St. John's Church).[1] Ronald also granted Marvin power of attorney in June 1995.

In late 1998, Ronald became seriously ill. Apparently, Marvin began acting as trustee of the Groh trust at this time, although the parties do not present evidence indicating that Marvin was formally assigned as successor trustee of the Groh trust before Ronald's death. On February 27, 1999, plaintiff tendered a check for $45,765.64 to Alvesta Veness, Ronald and Marvin's

[1] In his will, Ronald instructed that his assets be placed in the trust, where they would be distributed according to the trust's terms.

sister. On March 8, 1999, Marvin acknowledged that, with this payment, the terms of the promissory note had been satisfied. Ronald died on March 12, 1999.

After Ronald's death, defendant Lloyd J. Yeo was appointed successor trustee of the Groh trust. Yeo filed a cause of action against plaintiff on behalf of the trust, claiming that plaintiff had failed to fully comply with the terms of the promissory note and was in default for nonpayment. Plaintiff, however, argued that he had paid the note in full and that Marvin had the authority to acknowledge the same. After trial, a jury found that, although plaintiff had not paid the note in its entirety, Marvin had the authority to acknowledge that the note was paid in full. The jury then found that plaintiff owed nothing on the promissory note.

Approximately one year later, plaintiff filed a complaint against defendants Yeo and St. John's Church, initiating the present action. He alleged breach of contract, tortious interference with a contract, innocent misrepresentation, abuse of process, and conspiracy. Before the period of discovery was complete, the trial court dismissed all plaintiff's claims pursuant to MCR 2.116(C)(10).

I. Res Judicata

Plaintiff argues that the trial court erred when it dismissed his breach of contract and tortious interference with a contract claims after concluding that they were barred by the theory of res judicata.[2] We do not agree.

We review de novo the trial court's order granting summary disposition to defendants. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Defendants moved for summary disposition of plaintiff's breach of contract and tortious interference claims under MCR 2.116(C)(7). Although the trial court dismissed all plaintiff's claims pursuant to MCR 2.116(C)(10), we find that summary disposition should have been granted under MCR 2.116(C)(7), as defendants requested. We review an order granting summary disposition under the wrong subrule under the correct rule. *Shirilla v Detroit*, 208 Mich App 434, 437; 528 NW2d 763 (1995).

Summary disposition pursuant to MCR 2.116(C)(7) is proper if "[t]he claim is barred because of . . . prior judgment . . . ." "In analyzing a motion for summary disposition pursuant to MCR 2.116(C)(7), the contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Pusakulich v Ironwood*, 247 Mich App 80, 82; 635 NW2d 323 (2001). If no material issue of fact exists, the issue becomes whether a claim is barred pursuant to immunity granted by law. *Gilliam v Hi-Temp Products, Inc*, 260 Mich App 98, 108; 677 NW2d 856 (2003). The question whether the doctrine of res judicata applies is one

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[2] Plaintiff's complaint initiating this cause of action does not clarify if plaintiff intended to allege breach of contract and tortious interference with a contract against the Groh trust, St. John's Church, or both. However, on appeal, plaintiff only challenges the trial court's dismissal of his breach of contract claim against the Groh trust and of his tortious interference with a contract claim against St. John's Church.

of law that we review de novo. *Phinisee v Rogers*, 229 Mich App 547, 551-552; 582 NW2d 852 (1998).

Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. *Jones v State Farm Mut Automobile Ins Co*, 202 Mich App 393, 401; 509 NW2d 829 (1993). "For res judicata to apply, defendant must establish the following: (1) the former suit was decided on the merits; (2) the issues in the second action were or could have been resolved in the former action; and (3) both actions involved the same parties or their privies." *Phinisee*, *supra* at 551.

To establish a claim for breach of contract, plaintiff must establish both the elements of a contract and the breach of it. See *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1990). "The essential elements of a valid contract are the following: (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005), quoting *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). Plaintiff must also demonstrate that the contract was breached and that he suffered damages as a result. See *Lawrence v Will Darrah & Assoc, Inc*, 445 Mich 1, 6-8; 516 NW2d 43 (1994); *Baith v Knapp-Stiles, Inc*, 380 Mich 119, 126-127; 156 NW2d 575 (1968).

On appeal, plaintiff only argues that res judicata does not bar him from bringing his breach of contract claim in the present action because he sought leave to amend his complaint to state a counter-claim for indemnity in the original action, but the trial court denied his motion. Specifically, plaintiff argues that, because the trial court barred him from filing an indemnity counterclaim in the original action, the principle of res judicata is not applicable to bar his claims against Yeo and the trust in this action.

In general, a counterclaim arising from the same transaction or set of occurrences as the principal claim must be joined in one action. *Van Pembrook v Zero Mfg Co*, 146 Mich App 87, 102; 380 NW2d 60 (1985). However, if leave to amend to state a counterclaim is denied and the ruling court does not expressly preclude a separate action, the party is not bound by Michigan's compulsory joinder rule and is free to raise the claim in another action. MCR 2.203(E). Regardless, a plaintiff's counterclaim is permissible only to the extent that it is allowed by the rules of res judicata. *Rinaldi v Rinaldi*, 122 Mich App 391, 399-400; 333 NW2d 61 (1983).

In the original action, plaintiff attempted to state a counterclaim for indemnity against Yeo and the trust. Yet in the present case, plaintiff alleges claims of breach of contract and tortious interference with a contract. Plaintiff provides no authority to support his argument that the trial court could not apply the principle of res judicata to bar him from raising claims against Yeo and the trust in this action that he could have raised in the original action, yet neglected to raise. Because plaintiff has not presented authority to support this position, we need not address the issue further. *Byrne v Schneider's Iron & Metal, Inc*, 190 Mich App 176, 183; 475 NW2d 854 (1991).

To establish a cause of action for tortious interference with a contractual relationship, plaintiff must establish the existence of a contract, a breach of this contract, and an instigation of this breach, without justification, by St. John's Church. *Mahrle v Danke*, 216 Mich App 343, 350; 549 NW2d 56 (1996). "[O]ne who alleges tortious interference with a contractual . . .

relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights . . . of another." *CMI Int'l, Inc v Intermet Int'l Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002), quoting *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1984).

Plaintiff does not dispute on appeal that the original suit between the parties was final and had been decided on the merits, or that the parties could have resolved the tortious interference claim in the original action. Plaintiff merely argues that St. John's Church is not in privity with Yeo and, therefore, res judicata does not bar plaintiff's claims against it.

Our Supreme Court has noted, "[i]n its broadest sense, privity has been defined as 'mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right.'" *Sloan v Madison Hts*, 425 Mich 288, 295; 389 NW2d 418 (1986), citing *Petersen v Fee Int'l, Ltd*, 435 F Supp 938, 942 (WD Okla, 1975). "Privity between a party and a non-party requires both a 'substantial identity of interests' and a 'working or functional relationship . . . in which the interests of the non-party are presented and protected by the party in the litigation.'"[3] *Phinisee, supra* at 553-554, quoting *SOV v Colorado*, 914 P2d 355, 360 (Colo, 1996), quoting *Pub Service Co v Osmose Wood Preserving, Inc*, 813 P2d 785, 787 (Colo App, 1991).

Plaintiff essentially argues that St. John's Church and the Groh trust were not in privity because the trust had beneficiaries besides St. John's. However, all beneficiaries of the trust had an interest in ensuring that debts owed to the trust were collected and distributed in accordance with its terms. Therefore, St. John's Church, a non-party to the original action, had a substantial interest that was determined by the outcome of the original litigation.

Moreover, a working, functional relationship existed between Yeo, in his capacity as successor trustee to the Groh trust, and St. John's, the trust's residual beneficiary. "[A] fiduciary relationship arises from the reposing of faith, confidence, and trust and the reliance of one upon the judgment and advice of another." *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 508; 536 NW2d 280 (1995). The relationship between a trustee and a trust beneficiary is a classic example of a fiduciary relationship in which one actor is charged with acting in the best interests of the other. *Portage Aluminum Co v Kentwood Nat'l Bank*, 106 Mich App 290, 294; 307 NW2d 761 (1981). Yeo, as trustee, was exercising his fiduciary duty to St. John's by enforcing its legal rights through the original litigation instituted against plaintiff to recover a debt that he believed was owed to the trust. Yeo and St. John's had a substantial identity of

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[3] This Court also noted that Black's Law Dictionary (6th ed) defines privity as follows:

> "mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right. . . . [It] signifies that [the] relationship between two or more persons is such that a judgment involving one of them may justly be conclusive upon [the] other, although [the] other was not a party to lawsuit." [*Phinisee, supra* at 553, quoting Black's Law Dictionary.]

interests and a working or functional relationship. *Phinisee*, *supra* at 553-554. Therefore, plaintiff's claim of tortious interference against St. John's is barred by the doctrine of res judicata.

II. Abuse of Process

Plaintiff argues that the trial court erroneously granted defendant's motion to dismiss plaintiff's abuse of process claim because questions of fact remained regarding whether St. John's Church committed an abuse of process. We disagree.

To successfully oppose a motion under MCR 2.116(C)(10), the non-moving party may not rely on mere allegations or denials, but must set forth evidence of specific facts showing that a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In evaluating the motion, the trial court must consider the pleadings, affidavits, depositions, admissions, and other evidence that the parties submitted, in the light most favorable to the party opposing the motion. *Id.* The trial court may only consider "the substantively admissible evidence actually proffered in opposition to the motion," and may not deny the party's motion on "the mere possibility that the claim might be supported by evidence produced at trial." *Maiden*, *supra* at 121. If the evidence offered fails to establish a genuine factual issue, the moving party is entitled to judgment as a matter of law. *Quinto*, *supra* at 362.

Plaintiff blurs the torts of abuse of process and malicious prosecution, discussing elements of a cause of action for malicious prosecution when attempting to argue that he had presented sufficient evidence before the trial court to survive an MCR 2.116(C)(10) motion for summary disposition. Abuse of process and malicious prosecution are separate torts. *Mitchell v Cole*, 176 Mich App 200, 213; 439 NW2d 319 (1989).

"To recover upon a theory of abuse of process, a plaintiff must plead and prove (1) an ulterior purpose, and (2) an act in the use of process which is improper in the regular prosecution of the proceeding." *Friedman v Dozorc*, 412 Mich 1, 30; 312 NW2d 585 (1981). A meritorious claim of abuse of process occurs in "a situation where the defendant has used a proper legal procedure for a purpose collateral to the intended use of that procedure." *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). The plaintiff must provide evidence of a "corroborating act that demonstrates the ulterior purpose," because "[a] bad motive alone will not establish an abuse of process." *Id.*

St. John's was not a party to the original litigation against plaintiff and, notably, plaintiff does not appeal the trial court's order dismissing his abuse of process claim against Yeo and the trust. In fact, plaintiff and defendants acknowledge that St. John's did not have the legal authority to bring a claim against plaintiff in the prior action to enforce a debt owed to the trust. Plaintiff alleges that although St. John's was not a party to the first action, "[St. John's] was utilizing the services of the trust as a 'straw man' in its attempt to extort money from [plaintiff] by having its 'straw man' . . . file a frivolous lawsuit against [plaintiff]. . . ." However, plaintiff fails to cite authority supporting his proposition that a cause of action for abuse of process can lie against a defendant who was not a party to the original action.

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. [*Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).]

Because plaintiff has not presented any authority to support his position, we need not address the issue further. *Byrne*, *supra* at 183.

Contrary to plaintiff's argument on appeal, neither malice nor a lack of probable cause is an element of an abuse of process claim. See *Friedman*, *supra* at 30. Rather, these are elements of the tort of malicious prosecution, which plaintiff has not alleged.[4] *Id*. at 48. To the extent that plaintiff argues that defendants' actions constituted malicious prosecution, he failed to allege the tort of malicious prosecution before the trial court or to include this assertion in his statement of questions presented on appeal. Therefore, this Court is not compelled to review this issue as a separate claim on appeal. MCR 7.203(A); MCR 7.212(C)(5); *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 172; 568 NW2d 365 (1997).

III. Innocent Misrepresentation

Plaintiff argues that the trial court erroneously granted summary disposition to defendants because a question of fact existed regarding whether Marvin Groh, acting in his capacity as trustee of the Groh trust, innocently misrepresented to plaintiff that his debt to the Groh trust had been satisfied. Specifically, plaintiff argues that Marvin represented to him that his payment of $45,765.64 to Alvesta Veness paid in full the debt on the promissory note owed to the trust. According to plaintiff, this representation that the promissory note was paid in full constituted a contract between him and Marvin on which he reasonably relied. We disagree. We review de novo the trial court's order granting defendant's motion for summary disposition of this issue. *Maiden*, *supra* at 118.

A claim of innocent misrepresentation exists "where a party detrimentally relies on a false representation in such a manner that the injury inures to the benefit of the party making the misrepresentation." *Forge v Smith*, 458 Mich 198, 211-212; 580 NW2d 876 (1998). Unlike a claim of common-law fraud, a plaintiff claiming innocent misrepresentation need not prove "a *fraudulent purpose* or an intent on the part of the defendant that the misrepresentation be acted

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[4] The *Friedman* Court noted, "elements of a tort action for malicious prosecution of civil proceedings are (1) prior proceedings terminated in favor of the present plaintiff, (2) absence of probable cause for those proceedings, and (3) 'malice,' more informatively described by the Restatement as 'a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based.'" *Friedman*, *supra* at 48 (quoting 3 Restatement Torts, 2d, §§ 674-681B, pp 452-473). Plaintiff must also establish a special injury. *Barnard v Hartman*, 130 Mich App 692, 694; 344 NW2d 53 (1983). A special injury is "some injury which would not necessarily occur in all suits prosecuted for similar causes of action." *Id.* at 695. This includes an injury to plaintiff's fame, to his person or liberty, or to his property. *Id.* at 694.

upon by the plaintiff . . . ." *M & D, Inc v McConkey*, 231 Mich App 22, 28; 585 NW2d 33 (1998). Furthermore, plaintiff need not establish that Marvin intended to deceive him or that he even knew that the statements were false. *Forge*, *supra* at 212; *M & D*, *supra* at 28. However, plaintiff must establish that he and the Groh trust were in privity of contract. *Forge*, *supra* at 212.

Plaintiff failed to present evidence establishing that the injury that he suffered as a result of Marvin's misrepresentation benefited the trust. *Forge*, *supra* at 211-212. In his complaint, plaintiff alleges that he suffered "[l]oss of income due to having to attend trial proceedings; . . . [e]xcessive attorney fees to defend the Defendants [sic] frivolous and fraudulent actions; . . . [a]ttorney fees to prove that the note was discharged in full; . . . [l]ost income, past, present, and future [and] . . . [a]ny and all other consequential damages that are allowable under law." However, plaintiff fails to explain how these damages benefit the trust. Plaintiff argues that "the Trust benefited from the payment [of $47,765.64 to Veness] since the monies were paid pertaining to the note," yet plaintiff paid the sum to Veness, not to the trust. Therefore, plaintiff fails to establish that the trust benefited from Marvin's alleged misrepresentations. Accordingly, the trial court did not err when it dismissed plaintiff's innocent misrepresentation claim pursuant to MCR 2.116(C)(10).

IV. Conspiracy

Plaintiff argues that the trial court erroneously dismissed his claim of civil conspiracy. We disagree. Again, we review a trial court's order regarding a motion for summary disposition de novo. *Maiden*, *supra* at 118.

"A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Admiral Ins Co v Columbia Cas Ins Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992). Plaintiff alleges that defendants and their attorneys conspired to commit the wrongdoings alleged in the other counts of his complaint. "However, 'a claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort.'" *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569 (2003), aff'd 472 Mich 91 (2005), quoting *Early Detection Ctr, PC v New York Life Ins Co*, 157 Mich App 618, 632; 403 NW2d 830 (1986). As discussed *supra*, plaintiff failed to present evidence establishing an actionable tort regarding his other causes of action. "Because plaintiff[] failed to establish any actionable underlying tort, the conspiracy claim must also fail." *Advocacy Org*, *supra* at 384. Accordingly, the trial court's order dismissing plaintiff's civil conspiracy claim was appropriate.

V. Premature Grant of Summary Disposition

Finally, plaintiff notes that the period of discovery established by the trial court had not closed when defendants filed their motion for summary disposition. He argues that the trial court should have permitted plaintiff to conduct additional discovery instead of granting defendants' premature summary disposition motion. We disagree. A motion for summary disposition is generally considered premature if it is granted before discovery on a disputed issue is complete. *Oliver v Smith*, 269 Mich App 560, 567; 715 NW2d 314 (2006). "However, summary disposition may nevertheless be appropriate if further discovery does not stand a reasonable

chance of uncovering factual support for the opposing party's position." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 25; 672 NW2d 351 (2003). "If a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence." *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994); see also *VanVorous v Burmeister*, 262 Mich App 467, 476-477; 687 NW2d 132 (2004). "An unsupported allegation which amounts solely to conjecture does not entitle a party to an extension of time for discovery, since under such circumstances discovery is nothing more than a fishing expedition to discover if any disputed material fact exists between the parties." *Pauley v Hall*, 124 Mich App 255, 263; 355 NW2d 197 (1983).

As discussed *supra*, plaintiff did not present independent evidence before the trial court, or indicate the existence of independent evidence in his brief on appeal, to establish all elements of his claims of abuse of process, innocent misrepresentation, or conspiracy. See *Bellows*, *supra* at 561. Permitting plaintiff further opportunity for discovery under these circumstances would amount to a mere fishing expedition to which plaintiff is not entitled. *Pauley*, *supra* at 263. Accordingly, the trial court's decision to grant summary disposition of these claims before the completion of discovery was not erroneous.

As discussed *supra*, plaintiff's claims of breach of contract and tortious interference with a contract should have been dismissed pursuant to MCR 2.116(C)(7). Motions for summary disposition pursuant to MCR 2.116(C)(7) should be raised in a party's responsive pleadings. MCR 2.116(D)(2). Accordingly, plaintiff's argument that summary disposition of these claims was premature because the claims were dismissed before the close of discovery is irrelevant.

Affirmed.

/s/ Christopher M. Murrary
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens